

**IN THE
SUPREME COURT OF MISSOURI**

No. SC 87669

**INVESTORS TITLE COMPANY, INC.,
Plaintiff/Respondent/Cross-Appellant,**

v.

**JANICE HAMMONDS and
ST. LOUIS COUNTY, MISSOURI,
Defendants/Appellants/Cross-Respondents.**

**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
CAUSE NO. 01CC-004336
DIVISION NO. 9
HONORABLE DAVID LEE VINCENT, III.**

Substitute Brief of Appellants Janice Hammonds, *et al.*

**PATRICIA REDINGTON, #33143
COUNTY COUNSELOR
Cynthia L. Hoemann, #28245
Associate County Counselor
41 South Central, 9th Floor
Clayton, MO 63105
(314) 615-7042 Fax (314) 615-3732
Attorneys for Janice Hammonds, *et al.***

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JURISDICTIONAL STATEMENT

This appeal originated in the Missouri Court of Appeals, Eastern District. On May 30, 2006, this Court granted Defendants/Appellants' application for transfer pursuant to Rule 83.04. Jurisdiction is proper in this Court pursuant to Mo. Const. Art. V, § 10.

Defendants/Appellants Janice Hammonds, Recorder of Deeds and St. Louis County, Missouri (collectively "County"²) appeal the judgment in favor of Plaintiff/Respondent Investors Title Company, Inc. ("Investors") in the amount of \$499,391.00 on Investors' action for money had and received, LF 358, A1, and the amended judgment and order adding prejudgment interest of \$143,701.46 and increasing the total amount to \$643,092.46, LF 375, A2.

² Defendants/Appellants use "County" as inclusive of both appellants, since the lawsuit named Recorder in her official capacity and therefore is treated as a suit against the County. *Gas Service Co. v. Morris*, 353 S.W.2d 645, 647-648 (Mo. 1962). *See also Liebe v. Norton*, 157 F. 3d 574, 577 (8th Cir. 1998) (pertaining to §1983 claims against a defendant in the official capacity).

STATEMENT OF FACTS

Margaret King (“King”), a former employee of the St. Louis County Recorder of Deeds office (“Recorder’s office”), used her position as a cashier to steal hundreds of thousands of dollars in connection with fees imposed for the filing of documents in the Recorder’s office. In 2003, King pled guilty to twelve counts of felony stealing and was sentenced to 12 years in prison. A6³. From December 1996 through 2001, King overcharged Investors some \$727,215 for services provided to Investors by the Recorder’s office. T 61.

During this period, there were two systems for recording documents in St. Louis County. T 141-166. Individuals who came in to record documents such as deeds would come in, wait while the clerks processed their deed, wait while the documents were recorded, and then walk over to the cashier to pay the cost of recording their documents. T 141-147. Title companies which recorded many dozens of documents throughout the day were treated differently. T 147-166. They were not required to wait for clerks to process their documents; instead, title company representatives brought their documents over to the Recorder’s office, signed their documents in, and left. T 148-151. As their documents were recorded, the recording clerk created invoices listing the number of pages and the cost of recording each document the title company dropped off during the day, and she gave those invoices to the cashier throughout the day. T 154-155.

³ The trial court took judicial notice of the entire court file in *State vs. Margaret King*, Case No. 01 CR-5502, Circuit Court of St. Louis County. T 384.

Title companies were required to pay their bills on a daily basis. T 173-174. Some of the title companies called at the end of the day to ask the cashier how much they owed, and brought over checks that day or the next morning to pay their bills. T 174-176. Other companies, like Investors, brought blank checks over sometime during the day and authorized the cashier to fill in the total at the end of the day. T 176-177. Either way, the cashier provided a set of invoices for the day listing each transaction and each transaction's cost. T 176-177. She also gave the company an adding machine tape which purported to add up the day's invoices and show the total payment due. T 164-166. This informal arrangement, and in particular as it pertained to the relationship between County and Investors, was never reduced to writing. T 177-179.

During the time period in question, County actually provided Investors dual invoices for each day's transactions, on County letterhead, detailing exactly what was owed for that day's recordings. T 164-167. Investors did not receive any invoices for charges other than for services rendered. T 164-167. The invoices, which served as receipts, showed exactly what documents were recorded, how many pages each document contained, and how much it cost to record each document. T 65, 162. Invoices were made available for retrieval by Investors throughout the day for each group of documents upon delivery of that group to the Recorder's office. T 163. A complete second set of invoices was provided at the end of the day for all the day's transactions. T 164-165. Attached to the second set of invoices each day was an adding machine tape which purported to show the invoice totals but which actually exceeded them; when King

worked in the cashier's office, she added hundreds of dollars more than the actual invoice fees to the adding machine tape each day, resulting in inflated adding machine tape totals. T 164-167.

For every day that King worked during the period 1995-2001, Investors received an inflated adding machine tape that did not match the total shown on the invoices to which it was attached. T 66. There were many days when the adding machine tape was at least \$1,000 more than the sum of the receipts. T 67. Each day Investors paid the exact amount of the adding machine tape, without checking the invoices themselves. T 69. During that time, no one – including the people at Investors – ever complained about Maggie King's bookkeeping or cashier abilities, no one told County they were being overcharged and no one ever suggested to Recorder that Maggie King might be stealing money or falsifying County records. T 195. Janice Hammonds knew that every day the Recorder's office was receiving payments from title companies, each title company got two complete sets of invoices, and that each separate set provided itemization of all the charges for the day's transactions. T 164-167. Janice Hammonds also knew that when the recorder's ledgers were closed for the day, they always balanced – each day, the recorder's deposit into the county treasury matched the computer totals for the day's transactions. T 195, 241-242. Whenever Janice Hammonds did a check of Maggie King's paperwork, the totals always came out right. T 195, 211-212, 243.

During that time period, no one from the Recorder's office reconciled cash and check amounts; however, reconciliation would not have eliminated the risk of theft. T

332, 413-414, 433-434. An imbalance between cash and checks would not necessarily mean that someone was stealing or that anyone was overcharged. T 314-315, 433. In order to pinpoint what was causing a cash/checks imbalance, the Recorder's office would have had to pull out every single invoice and transaction for the day and try to reconcile those. T 315. Investors could have discovered King's stealing by spending a few minutes per day to reconcile the invoices with the adding machine tape total. T 434-435. A discrepancy between a single adding machine tape and the corresponding set of invoices was discovered by Investors in September of 2001 and reported to the Recorder's office. T 54-55, 200-201.

The day that Investors notified County of a single day's overcharges, the overcharges stopped. T 68. Both Investors and Recorder did an accounting and agreed that Investors was overcharged during the period 1995 to 2001. T 55-56, 58-59, 61, 140-141, 199-200, 231-232. After Recorder confirmed that Margaret King had overstated the calculated total for Investors, Recorder verified other title company charges. T 205. All other title company calculated totals were accurate. T 205. County's daily deposits never exceeded the amount of fees due for that day's recording of documents and other transactions. T 182-183, 195, 242. Each day that Margaret King falsified Investors' totals and their checks, she stole cash in the exact amount of Investors' overpayments. T

182-183, 195, 205, 242, 298. Margaret King was discharged, T 206-207, and eventually pled guilty to 12 counts of felony stealing, A6⁴.

Investors brought this suit against St. Louis County, the Recorder, and Norris Acker, Director of Revenue (“Director”) seeking to recover the overpayments. LF 45 at ¶ 22. The First Amended Petition, LF 41-57, includes nine counts: Count I – Declaratory Judgment and Common Law Refund; Count II – Breach of Contract; Count III – Establishment of Prepaid Accounts; Count IV – Neglect of Duty; Count V – Due process claim under 42 U.S.C. § 1983; Count VI – RESPA claim under 42 U.S.C. §1983; Count VII – Equal protection claim under 42 U.S.C. § 1983; Count VIII – Negligence; and Count IX – Conversion. The Trial Court dismissed Counts II, III, IV, VIII, and IX, but denied County’s motion to dismiss Counts I, V and VII. LF 304. Investors voluntarily dismissed Count VI (RESPA claim under 42 U.S.C. §1983) as well as all claims against Director. LF 332. The case proceeded to a jury trial on Counts I (Common Law Refund), V (Due Process) and VII (Equal Protection).

At the close of Investors’ evidence, County moved for a directed verdict on all three remaining counts, T 368-369, which was denied. T 370, 375, 383. At the close of all the evidence, the Trial Court granted County’s motion for a directed verdict on Count V, T 445, and VII, T 448, and denied each side’s motion for a directed verdict on Count I, T 439, 451. At the instructions conference, T 452-459, the Trial Court overruled

⁴ The trial court took judicial notice of the entire court file in *State vs. Margaret King*, Case No. 01 CR-5502, Circuit Court of St. Louis County. T 384.

County's objection to Instruction No. 8 (withdrawal instruction), LF 346, which instructed the jury not to consider evidence that Investors did not take action to verify charges made by Recorder, T 456-457, and refused Instruction No. A (five year statute of limitations – submitted by Investors), LF 350, Instruction No. F (reliance by plaintiff on County's calculations – submitted by Investors), LF 355, Instruction No. B (one year statute of limitations – submitted by County), LF 351, Instruction C (change of circumstances defense – submitted by County), LF 352, Instruction D (consent defense – submitted by County), LF 353, and Instruction E (failure to mitigate damages – submitted by County), LF 354. T 453-454.

The jury returned a verdict in favor of Investors and assessed damages at \$499,391.00. LF 356-357. On January 27, 2005, the Trial Court entered judgment for Investors for \$499,391.00. LF 358, A1. County filed a motion for judgment notwithstanding the verdict or for a new trial, LF 359-363. Investors filed two separate motions to amend the judgment, LF 364-371, and a motion for judgment notwithstanding the verdict, LF 372. On February 28, 2005, the Trial Court denied all post trial motions, except for Investors' Second Motion to Amend the Judgment, LF 368. That motion was granted in part and the judgment was amended to add prejudgment interest of \$143,701.46, for a total judgment of \$643,092.46. LF 374-375, A2. County appealed, LF 376, and Investors cross-appealed, LF 389.

POINTS RELIED ON

I. The Trial Court erred in denying Defendants’ motion for a directed verdict and motion for judgment notwithstanding the verdict on Count I (Declaratory Judgment and Common Law Refund) because Plaintiff failed to make a submissible case in that there was no evidence of any written contract as required by § 432.070 RSMo and County cannot be liable based on an implied contract for money had and received.

Donovan v. Kansas City, 175 S.W.2d 874 (Mo. banc 1943)

Fulton National Bank v. Callaway Memorial Hospital,

465 S.W. 2d 549 (Mo. 1971)

Carter v. Reynolds County, 288 S.W. 48 (Mo. 1926)

§ 432.070 RSMo.

II. The Trial Court erred in denying Defendants’ motion for a directed verdict and motion for a judgment notwithstanding the verdict on Count I because the evidence did not establish the essential elements for money had and received in that there was no evidence that County gained anything from Investors’ overpayments, and thus no evidence of a “benefit conferred” or “appreciation by the defendant of the fact of such benefit” as is required for recovery under the theory of money had and received.

Kubley v. Brooks, 141 SW 3d 21 (Mo. 2004)

Dickey v. Royal Banks of Missouri, 111 F. 3d 580 (8th Cir. 1997)

III. The Trial Court erred in denying Defendants’ motion for a directed verdict and motion for a judgment notwithstanding the verdict on Count I because the evidence did not establish that “the enrichment of the defendant be unjust” as is required for recovery under the theory of money had and received, in that the evidence showed that Margaret King stole from Investors by falsifying the checks and the totals, which enabled her to steal cash from County in the exact amount of the overpayments before Defendants became aware of the overpayments, and Defendants’ duty of restitution is therefore terminated “*pro tanto*.”

Kubley v. Brooks, 141 SW 3d 21 (Mo. 2004)

Restatement, Restitution, §142

Oakley Building & Loan Company v. Murphy, 84 N.E. 2d 749 (Ohio App., 1948)

Western Casualty and Surety Co. v. Kohm, 638 S.W. 2d 798 (Mo. App. E.D. 1982)

IV. The trial court erred in giving Jury Instruction No. 8 (withdrawal instruction), because evidence of Investors’ failure to examine the receipts provided each day by County concerned an issue still before the jury, namely whether the payments were made under circumstances in which retention without refund would be unjust, and the withdrawal of this evidence prejudiced Defendants and requires reversal.

Kubley v. Brooks, 141 SW 3d 21 (Mo. 2004)

Restatement, Restitution, §142

Klaus v. Deen, 883 S.W. 2d 904, 907 (Mo. App. E.D. 1994)

Western Casualty and Surety Co. v. Kohm, 638 S.W. 2d 798 (Mo. App. E.D. 1982)

V. The trial court erred in refusing to give proffered Jury Instruction No. C stating Defendants’ “change of circumstances” defense because there was sufficient evidence for the jury to decide that Margaret King stole cash in the exact amount of Plaintiff’s overpayments and that Defendants were no more at fault than Plaintiff in failing to discover that Margaret King was inflating Plaintiff’s checks and totals, and Jury Instruction No. C correctly stated the law to be applied.

Restatement, Restitution, §142

Oakley Building & Loan Company v. Murphy, 84 N.E. 2d 749 (Ohio App., 1948)

Western Casualty and Surety Co. v. Kohm, 638 S.W. 2d 798 (Mo. App. E.D. 1982)

ARGUMENT

I. The Trial Court erred in denying County’s motion for a directed verdict and motion for judgment notwithstanding the verdict on Count I (Declaratory Judgment and Common Law Refund) because Investors failed to make a submissible case in that there was no evidence of any written contract as required by § 432.070 RSMo and County cannot be liable based on an implied contract for money had and received.

The standard of review in considering a trial court's denial of a motion for directed verdict or JNOV is whether or not the plaintiff made a submissible case. *City of Sullivan v. Truckstop Restaurants, Inc.*, 142 S.W. 3d 181, 191 (Mo. App. E.D. 2004). Substantial evidence is required for each and every fact essential to liability in order to make a submissible case. *Id.* The issues of whether the evidence is substantial and whether the inferences drawn are reasonable present questions of law. *Id.* This Court views the evidence in the light most favorable to the verdict, giving the plaintiff the benefit of all reasonable inferences. *Id.*

“Common law refund,” the theory under which Investors seeks recovery in Count I, is a term sometimes used to describe an action for money had and received. An action for money had and received is “based . . . on equitable principles permitting recovery of money from defendant that, in all justice and fairness, the evidence shows defendant should not keep.” *Kubley v. Brooks*, 141 S.W.3d 21, 29 (Mo. banc 2004). “An action for money had and received is proper where the defendant received money from the plaintiff

under circumstances that in equity and good conscience call for defendant to pay it to plaintiff.” *Palo v. Stangler*, 943 S.W.2d 683, 684 (Mo. App. E.D. 1997). “[I]t partakes to some extent of equitable principles” *Fulton Nat’l Bank v. Calloway Memorial Hospital*, 465 S.W.2d 549, 553 (Mo. 1971).

But despite its reliance on equitable principles, money had and received actually “sounds in contract.” *Kubley v. Brooks*, 141 S.W.3d at 31. *See also Fulton Nat’l Bank v. Calloway Memorial Hospital*, 465 S.W.2d at 553 (noting that an action for money had and received is a suit “upon an implied contract created by law”). A plaintiff who proceeds under the theory of money had and received “is not suing in tort, but rather is suing in contract” *Kubley v. Brooks*, 141 S.W.3d at 31. That being the case, the inquiry becomes whether contract liability may be imposed upon County under the operative facts.

Contracts with counties are governed by and subject to the requirements of Section § RSMo, which provides that:

No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law

and duly appointed and authorized in writing.

In this case, there was no evidence of any document that was subscribed by the parties or that set forth the consideration for a promise to make any payment to Investors. Further, there was no evidence of any statute, ordinance or charter provision that would have given Recorder the authority to make any payment to Investors had she wished to do so.

The absence of a written contract is fatal to Investors' claim for relief under Count I. The requirement for written contracts is mandatory rather than merely directory.

Donovan v. Kansas City, 175 S.W.2d 874, 881 (Mo. banc 1943). The clear mandate that counties may contract only by written instrument precludes the imposition of an implied contract under equitable principles, pursuant to the general maxim that "equity follows the law." Thus in a different context, this court in *Kuenzle v. Mo. State Highway Patrol*, 865 S.W.2d 667 (Mo. banc 1993), applied the maxim that equity follows the law to reverse the trial court's expungement of an arrest report given the then-existing statutory scheme that did not allow for such expungement:

No statutory basis exists for expungement of Kuenzle's arrest record.

Furthermore, the arrest records statute precludes equitable expungement of the record under the facts of this case. The legislature made a determination that law enforcement agencies should have the right to view its applicants' closed arrest records. Kuenzle's situation squarely fits within the statute.

Where a statute clearly defines the rights of parties, the statute may not be unsettled or ignored "Equity Courts may not disregard a statutory

provision, for where the Legislature has enacted a statute which governs and determines rights of the parties under stated circumstances, equity courts equally with courts of law are bound thereby.”

Id. at 669 (citations omitted).

Adherence to this maxim has been consistent. *See McGhee v. Dixon*, 973 S.W.2d 847, 849 (Mo. banc 1998) (disallowing equitable award of attorneys fees when statute had been enacted establishing comprehensive scheme for award of such fees and statutory criteria had not been met); *Jones v. St. Louis County Police Dept.*, 133 S.W.2d 524, 526 (Mo. App. E.D. 2004) (reversing expungement order when statutory criteria for expungement had not been met). Not only has this maxim been applied generally by the courts, but it has been applied specifically to preclude the exact result sought by Investors herein: namely, recovery of money from a city under a quasi contract theory when the party was unable otherwise to recover due to the lack of a written contract as required by statute.

In *Donovan v. Kansas City*, 175 S.W.2d 874, plaintiff’s decedent sought to recover for food supplied to the city’s hospitals and penal institutions over a period of many months. The supplier had delivered the food upon telephonic instructions from the city’s Commissioner of Purchases and Supplies, but the transactions were also evidenced by some writings. As stated by the court:

The head of the department would requisition the foods upon defendant's printed form, subscribe the same and forward it to the Commissioner of

Purchases and Supplies; then said Commissioner would order by telephone such foods from plaintiff's decedent and direct the date of delivery, in many instances causing said original to be stamped 'confirmation.' Said original would carry no prices and no signature except the signature of the department head. The Commissioner retained the original and all copies of the printed form. Plaintiff's decedent, in turn, would deliver the requisitioned foods and take a receipt therefor, signed by the department head, upon his invoices and deposit with the Commissioner the original and two carbons of said invoices, which would be attached to defendant's requisition.

Id. at 878. Clearly, then, the supplier had some reason to believe that the transactions were authorized and that he would be paid for the food that was provided for the city's use; he "delivered said food products believing, in good faith, that defendant would pay therefor, without which belief such deliveries would not have been made." *Id.* at 877.

Yet despite the signed invoices suggesting the authenticity of the telephonic order, and despite the fact that the food was delivered, accepted and used by the city, the supplier was unable to obtain a judgment for payment of the value of benefits received. Instead, the court cited to the statutory provision requiring written contracts⁵ and followed "[t]he cases [that] deny a recovery for a benefit received under an ultra vires contract prohibited by positive law." *Id.* at 884. More explicitly:

⁵ At that time, the provisions of §432.070 were contained in and designated as §3349 RSMo (1939).

Equity supplies a defect in the legal remedy. Plaintiff's difficulty lies in the legal policy - a policy which makes the transactions void and precludes a remedy. The rule that the common law and equity yield to express legislative enactments contra, precluding any action at law or in equity on a contract forbidden by law, is applicable.

Id. The court was cognizant of the injury this caused to the food supplier but deferred to the General Assembly's determination that it was "better to adopt . . . a rule under which individuals may suffer occasionally than to permit a rule subjecting the public to injury through the possibility of carelessness or corruptness of public officials." *Id.* at 885.

While more thorough than earlier cases in addressing and refuting the possibility of equitable recovery for services provided under contracts which failed to comply with statutory requisites, *Donovan* was not a case of first impression but was in fact merely following prior case law to the same effect. *Donovan* cited to the case of *Crutchfield v. Warrensburg*, 30 Mo. App. 456 (Mo. App. 1888), a case which referenced 1874 as being the year in which was first enacted the requirement that contracts with cities⁶ be in writing. In *Crutchfield*, the court rejected a city attorney's request for payment for services that had been rendered at the mayor's request after expiration of the city attorney's term. In rejecting the city attorney's request for recovery under a theory of *quantum meruit*, the court observed:

This statute was first enacted in 1874. . . . The history of the times which

⁶ Counties were included in that first enactment as well.

evoked this legislation can leave no doubt in the mind of one familiar with it, that the controlling purpose inspiring the legislature was to cut off absolutely, among other things, just such claims as the one under consideration. To subject the city to liability for such services, the statute declares affirmatively that the contract must be made and executed in writing prior to the service performed, for it must express the consideration on its face, to be performed or executed *subsequent* to the making of the contract “If a person can, without such contract, in the first instance, go on and bind the city as on an implied contract for the value of his services, it would defeat the very object and design of the legislature in enacting said statute.”

Id. at 462 (citations omitted).

Consistently with and citing to *Crutchfield*, the court in *Carter v. Reynolds County*, 288 S.W. 48 (Mo. 1926), cited to §432.070 's precursor in denying a “contractor’s” claim for payment in return for the driving of piling pursuant to the county court’s order offering \$500 as the county’s share for the completion of such work. Finding that no contract had been authorized and executed, the court rejected the quantum meruit claim as well. “The statute, in prescribing the mode by which alone a county can obligate itself by contract, *negatives the idea of a promise on its part arising by implication of law*. The defendant cannot be held as on an implied contract.” *Id.* at 50

(emphasis added).⁷ See also *Hillside Securities Co. v. Minter*, 254 S.W. 188, 193 (Mo. banc 1923) (Rejecting unpaid warrants for bridges constructed under a contract that failed to comply with the antecedent to §432.070 and stating that “Persons contracting with county courts must be held to know the law and to know that contracts not entered into in compliance with such statutory provisions are void.”).

Still another instance of this court’s enforcement of the §432.070 mandates can be found in *Fulton National Bank*, 465 S.W. 2d 549 (Mo. 1971). In *Fulton Nat’l Bank*, the purchaser of notes endorsed with recourse by a county hospital sought recovery of unpaid balances in an action for money had and received against the hospital. Notwithstanding that the hospital had accepted and spent the money it received in consideration for the

⁷ The court refused payment notwithstanding the existence of a statute providing that “If a claim against a county be for work and labor done, or material furnished in good faith by the claimant, under contract with the county authorities, or with any agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such work, labor and material, though such authorities or agent may not, in making such contract, have pursued the form of proceedings prescribed by law.” It was the court’s opinion that the plaintiff could not avail himself of this provision until he established that the work had been done “under a contract with the county.” *Carter*, 288 S.W. at 50.

endorsed notes, the Missouri Supreme Court did not allow recovery.⁸ After noting that the hospital no longer held any specific money of the plaintiff and that - as in the instant case - “[a] repayment would now come out of taxpayers’ monies,” *id.* at 552, the court cited to *Donovan* and found that “the illegal (or ultra vires) transaction cannot be evaded by permitting a recovery upon a theory of ‘implied’ rather than express contract.” *Id.* at 554. Thus once again, the court chose to follow “the majority of the authorities [which] hold that [money had and received] is not effective to overcome or evade a policy which makes a transaction void because it is ultra vires or illegal” *Id.* at 553.

Time and time again, Missouri courts have rejected efforts to recover, in the absence of a written contract, against entities subject to the requirements of §432.070 . Thus in *Mays-Maune & Associates, Inc. v. Werner Brothers, Inc.*, 139 S.W.3d 201 (Mo. App. E.D. 2004), the court affirmed dismissal of a building materials supplier’s claim of unjust enrichment against a school district, after a subcontractor failed to pay for supplies used for the school district. The court observed that §432.070 “has been interpreted by Missouri courts to preclude recovery . . . on any theory of implied contract.” *Id.* at 208 (Citation omitted). Likewise rejecting an implied contract claim against a school district, the court noted in *Strain-Japan R-16 School District v. Landmark Systems, Inc.*, 51 S.W.3d 916, 922 (Mo. App. E.D. 2004) that “[t]he statutory requirement that the contract be in writing is mandatory and strict compliance is required in order to bind a public

⁸ In *Fulton National Bank*, the noncompliance consisted of making a contract not within the scope of the hospital’s powers.

entity.” *See also Duckett Creek Sewer District of St. Charles County v. Golden Triangle Development Corporation*, 32 S.W. 3d 178, 182 (Mo. App. E.D. 2000) (Reversing judgment against a sewer district in the absence of a contract as required by §432.070).

Interestingly, plaintiffs in *all* of the above-cited cases failed to recover for an implied-in-law contract notwithstanding their universal and compelling status as parties who *had conferred a benefit upon the cities and counties from which they sought recovery*. In *Donovan*, the plaintiff had provided approximately \$100,000 worth of food to the city,⁹ over the course of many months, and always at the instruction of and with an invoice to the Commissioner of Purchases and supplies. There was no dispute that the *Crutchfield* city attorney had provided professional services to the city at the mayor’s request; that the *Carter* pile driver had solved the county’s problem with a changing river channel after the county court entered an order suggesting it would contribute \$500 for that purpose; that the *Hillsdale* builder had constructed adequate bridges after its plans had been approved by the highway engineer; or that the hospital had received consideration for the notes it then refused to honor in *Fulton Nat’l Bank*. But in each case, the fact of the city/county’s enrichment was acknowledged yet held for naught by the courts. Instead, the courts repeatedly adhered to the law established by legislative enactment and ruled that “a plaintiff may not recover upon an implied contract for money

⁹ The *Donovan* case was decided in 1943. A purchase of \$100,000 in 1943 would cost more than a million dollars today, using CPI-based projections set forth at a United States Department of Labor site (data.bls.gov).

had and received in such a situation, even though a benefit has been received by the defendant.” *Donovan*, 465 S.W.2d at 553 (citations omitted).

In the instant case, of course, County received no benefit from Investors and ended each day in the same financial position it would have occupied had no malfeasance occurred. County neither sought nor retained any benefit from Investors. So, Investors lacks even the compelling moral argument that the above-cited plaintiffs were able to claim for recovery - an argument which was ultimately insufficient to overcome the same statutory enactment to which Investors’ claim is subject. As the court noted in *Donovan*, 175 S.W.2d at 881, “notwithstanding plaintiff’s claim was morally just and the charge reasonable, we are without power to enforce mere moral precepts in contravention of positive statute.” (Citation omitted).

In affirming the trial court’s refusal to enter judgment for County on Count I of Investors’ complaint, the Eastern District relied on one of two “blips” in 100+ years of uninterrupted precedent that has interpreted §432.070 to preclude actions against cities and counties for money had and received. In affirming the trial court, the Eastern District quoted extensively from *Karpierz v. Easley*, 68 S.W.3d 565 (Mo. App. 2002),¹⁰ wherein

¹⁰ The first “blip” occurred in the case of *Ballard’s Estate v. Clay County*, 355 S.W. 2d 894, 897 (Mo. 1962), when the court found that “if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution.” But in *Fulton National Bank*, the Missouri Supreme Court held *Ballard* inapplicable to the facts at hand and went on to observe that “if it is deemed to be

the plaintiff successfully sued the city for money had and received when the city seized funds from him in a manner violative of the Criminal Activity Forfeiture Act. The Western District considered and rejected the city's defense that §432.070 precluded recovery for money had and received:

Because of the writing requirement of §432.070, some courts have held that municipal organizations cannot be held liable in contract under theories of ratification, estoppel, or contract implied in fact. . . . This is because the municipality lacks the authority to enter into an unwritten contract, and such a contract is deemed void. . . .

However, neither §432.070 nor the case law related thereto are applicable to this case. Karpierz [sic] theory of recovery is not based on a contract implied in fact. As noted, *supra*, his claim for money had and received rests on "quasi-contract" or a "contract implied at law."

Id. at 572-73.

The *Karpierz* court's basis for allowing recovery against a city without a written contract, in the face of over 100 years of overwhelming precedent, was the distinction it

[applicable], it would in our opinion be in conflict with the *Donovan* case . . . which . . . is controlling." *Ballard* has remained, for all practical purposes, uncited but for the *Fulton National Bank* reference.

drew between contracts implied in fact and contracts implied in law. Not only were prior cases void of such a distinction, but the distinction was in fact based on a false premise. *Karpierz* wrongly characterized the precedent cases as dealing with contracts implied in fact when they actually dealt with contracts implied in law.

In support of its contention that courts had previously denied recovery in cases dealing with contracts implied in fact, *Karpierz* cited *Duckett Creek Sewer District of St. Charles County*, 32 S.W.3d 178 (Mo. App. E.D. 2000). The *Duckett* court had rejected the plaintiff's request for "a determination that the sewer district must execute a sewer main extension contract with the developer," *id.* at 181 n.1, finding that the municipality could not be liable "either on the theory of a ratification, estoppel or implied contract." *Id.* at 183 (citations omitted). Although the court did not explicitly characterize the term "implied contract" as referring to a contract implied in law rather than in fact, it is clear from the context that such was the case.¹¹ Moreover, the Western District had itself repeatedly recognized prior to *Karpierz* that an action for money had and received is, *by definition*, based on a promise implied by law. *See Salisbury R-IV School District v. Westran R-I School District*, 686 S.W.2d 491, 497 (Mo. App. W.D. 1984) ("The remedy

¹¹ The grouping of "implied contracts" with the theories of ratification and estoppel indicates that the referenced contracts are contracts implied in law rather than fact. It is only contracts implied in law that are, like ratification and estoppel, equitable concepts. A contract implied in fact would be a true contract with the same legal status as an express contract. *See Bailey v. Interstate Airmotive*, 219 S.W.2d 333, 338 (Mo. 1949).

[of money had and received] is based on a promise implied by law”); *Weltscheff v. Medical Center of Independence, Inc.*, 604 S.W. 2d 796, 801 (Mo. App. W.D. 1980) (“[A] suit for money had and received is . . . founded upon . . . an implied contract created by law.”). The *Karpierz* departure from the court’s own precedent is inexplicable.

More importantly than the Western District precedent, the Missouri Supreme Court had likewise expressly stated that the very cause of action for money had and received is based on a contract implied by law:

The cases involving actions for money had and received are not entirely clear or wholly consistent. Essentially, such a suit is one for unjust enrichment, and it partakes to some extent of equitable principles, though not strictly such an action. It is not a suit upon express contract but upon *an implied contract created by law*.

Fulton Nat’l Bank, 465 S.W.2d at 553 (emphasis added). Thus in attempting to distinguish the overwhelming precedent, the Western District in *Karpierz* and the Eastern District in this case were simply incorrect in suggesting that prior case law on §432.070 addressed and prohibited only contracts implied in fact.¹² Investors’ efforts to evade

¹² Section 432.070 on its face prohibits contracts implied in fact, since contracts implied in fact are true contracts, *see Bailey v. Interstate Airmotive*, 219 S.W.2d at 338, and § 432.070 bars all non-written contracts. The only question which the courts have needed to address has been whether a quasi contract, which “it is said is no ‘contract at all’ but

the strictures of §432.070 are understandable, but should be rebuffed. The remedy of money had and received is not available against a county protected by §432.070 .

Allowing the judgment against County to stand would not serve to disgorge any unjust enrichment by the County but would instead simply shift Investors' private loss to the public. However, such loss shifting would be contrary to the principle that "[t]he unauthorized acts of public officials are, and in law are known to be, unauthorized and consequently not binding on the principal, their mistakes being their own and not the mistakes of the sovereign. All this rests in a sound public policy for the protection of the public." *Elkins-Swyers Office Equipment Co. v. Moniteau County*, 209 S.W.2d 127, 131 (Mo. 1948).

Investors' difficulty is that the aforementioned "sound public policy" which protects the public is also one "under which individuals may suffer occasionally." *Donovan*, 175 S.W.2d at 885. It is regrettable that Investors has suffered an injury due to the unauthorized acts of a rogue County employee. It is also regrettable that Investors, being presumed under *Elkins-Swyers* to know that any wrongful acts by an employee would not be binding on the County, failed to protect itself against employee theft by simply reviewing its invoices on occasion. But public policy established in a long line of cases establishes that Investors - rather than the public - should bear the loss. Unless the court wishes to overturn 100+ years of precedent declining to find implied in law

which is commonly called a contract implied in law," *id.*, is likewise barred by the statutory prohibition against unwritten "contracts."

contracts against counties, the judgment in this case should be reversed and the case remanded for entry of judgment in County's favor.

II. The Trial Court erred in denying Defendants' motion for a directed verdict and motion for a judgment notwithstanding the verdict on Count I because the evidence did not establish the essential elements for money had and received in that there was no evidence that County gained anything from Investors' overpayments, and thus no evidence of a "benefit conferred" or "appreciation by the defendant of the fact of such benefit" as is required for recovery under a theory for money had and received.

The standard of review for reviewing a trial court's denial of a motion for directed verdict or JNOV is whether or not the plaintiff made a submissible case. *City of Sullivan*, 142 S.W. 3d at 191. Substantial evidence is required for each and every fact essential to liability in order to make a submissible case. *Id.*

Assuming, *arguendo*, that County could be liable for money had and received, Plaintiff did not make a submissible case because the evidence did not show that County received a benefit from from Investors and that it did so under circumstances that in equity and good conscience call for County to pay it to Investors. *See Kuble v. Brooks*, 141 S.W. 3d 21, 32 (Mo. 2004). The essential elements of an action for money had and received are: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; and (3) acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would

be inequitable. *Associate Engineering Company Co. v. Webbe*, 795 S.W. 2d 606, 608 (Mo. App. E.D. 1990).

Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. *Dickey v. Royal Banks of Missouri*, 111 F. 3d 580, 583 (8th Cir. 1997), quoting 1 Dobbs, *Law of Remedies* § 4.1(1) at 555. In the absence of a gain, County cannot be liable for money had and received. *See Kubley* at 32; *Dickey* at 583-584.

In finding that County received a benefit from its employee's theft, the Eastern District fundamentally erred in its analysis of the transaction itself. In purporting to do equity, the Eastern District found that County received and appreciated a benefit from Investors, *slip opinion* at p.7, as a result of its employee's fraudulent scheme. But County employee's scheme was such that County never appreciated or retained any benefit that could be disgorged. Instead, the employee stole from the cash drawer the exact amount by which she overcharged Investors each day, leaving no net gain for County.¹³ Yet the Eastern District dismissed this all-important fact as inconsequential:

The checks left by Investors were deposited by Recorder's office for the full, inflated amount filled in by King, and while the books may have balanced at the end of each day because King removed equivalent amounts of cash,

¹³ Even in *Karpierz*, which was similar to the instant case in that there was no suggestion that the parties had intended to contract, the city at least acquired something of value from the defendant - a *res* which could be attributed and returned to the claimant.

Recorder and County received excess money with each inflated check from Investors deposited by Recorder's office. *It is clear that Recorder and County received money from Investors, a "benefit conferred" and appreciated the fact of receiving such a benefit when the checks from Investors were deposited in a financial institution.*

Slip opinion at p.7 (emphasis added).

In fact, the exact opposite is clear and the appellate court's analysis defies both logic and general equitable principles. Logically, the County received no benefit because it ended each day with the exact amount of money to which it was entitled for the services provided that day. The County was no more benefited by deposit of the excess amount of the check than it would have been had the excess amount been deposited after having been offset by its return in cash to Investors. Either way, the deposit would have reflected an amount in excess of that owed for services rendered; the fact of the excess deposit alone, without regard to the disposition of the excess amount, is meaningless.

To parse the employee's scheme as did the Eastern District is to disregard the entire transaction and to disregard the maxim that "[e]quity pierces the form and takes cognizance of substance." *Taylor v. Baldwin*, 247 S.W.2d 741, 756 (Mo. 1952). In equity actions, "we look to the substance of the transaction and disregard its form. Equity goes behind the form of a transaction to give effect to the intentions of the parties concerned." *Kimberly v. Aldridge*, 357 S.W.2d 558, 562 (Mo. App. W.D. 1962). Here, the *substance* of each transaction at issue was a theft of Investors' funds by a rogue

County employee. The fact that Investors provided the funds by check rather than by cash - which would have allowed the employee to pocket the excess directly rather than await County's unwitting deposit of the excess funds as part of the scheme - does not change the transaction from one of theft by an employee to acquisition of an unjust benefit by County. Either way, the employee ended up with extra cash, County ended up with the exact amount of money to which it was entitled for services rendered and Investors ended up wrongfully deprived of its money by virtue of the employee's criminal actions. Given that the County never deposited or retained more than the amounts of money which covered the costs of its services, the Eastern District's discussion of whether it would be unjust to allow County to "retain" the excess money stolen and retained by County's former employee simply ignores the essence of the transaction.

III. The Trial Court erred in denying Defendants' motion for a directed verdict and motion for a judgment notwithstanding the verdict on Count I because the evidence did not establish that "the enrichment of the defendant be unjust" as is required for recovery under the theory of money had and received, in that the evidence showed that Margaret King stole from Investors by falsifying the checks and the totals, which enabled her to steal cash from County in the exact amount of the overpayments before Defendants became aware of the overpayments, and Defendants' duty of restitution is therefore terminated "*pro tanto*."

The standard of review for reviewing a trial court's denial of a motion for directed verdict or JNOV is whether or not the plaintiff made a submissible case. *City of Sullivan*, 142 S.W. 3d at 191. Substantial evidence is required for each and every fact essential to liability in order to make a submissible case. *Id.*

The trial court erroneously rejected County's argument that, as a result of King's theft of cash from County, which would have stopped immediately if Investors had examined receipts, County's duty of restitution was terminated or diminished.

In finding that there was sufficient evidence to establish that County's "retention" of Investors' overpayments was unjust, the trial court ignored the principles set forth in Restatement of Restitution, §142 which provides:

§ 142. Change Of Circumstances

(1) The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.

(2) Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.

(3) Change of circumstances is not a defense if

(a) the conduct of the recipient in obtaining, retaining or dealing with the subject matter was tortious, or

(b) the change occurred after the recipient had knowledge of the facts entitling the other to restitution and had an opportunity to make restitution.

Caveat: The rules stated in Subsections (2) and (3) are not intended to deny that change of circumstances may be a defense where there is a loss which must be borne by one of the parties and where the recipient was more at fault than the claimant, either because he was careless in not knowing facts or because he obtained the subject matter by an innocent misrepresentation.

Id.

This rule is an application of the underlying principle that restitution is granted only where it is equitable so to do. *Restatement, Restitution*, §142, comment *a*. “Where events are such that a loss must be suffered by one of the parties, either with or without the ability to obtain reimbursement from a third person, justice does not require that the recipient should bear this loss, where he is guilty of no greater fault than that of the claimant.” *Id.* “Any change of circumstances which would cause or which would be likely thereafter to cause the recipient entire or partial loss if the claimant were to obtain full restitution, is such a change as prevents full restitution if the recipient was not guilty

of a tort nor substantially more at fault than the claimant.” §142, comment *b*. In determining whose fault is greater, the circumstances both preceding and subsequent to the transaction are considered. *Restatement of Restitution*, §142, comment *c*. Thus, if, after the transaction but before the loss, either party becomes aware of facts from which, were he careful, he would ascertain that it was entered into under a basic mistake, such failure constitutes lack of due care and is to be considered in the determination of fault. *Id.*

The application of these principles to theft by a rogue employee is discussed in §142, comment *b*. Where an agent steals money from a third person which he deposits to a principal’s account, if the money is stolen or if the agent is thereby enabled to steal other money from the principal before the principal becomes aware of it, the principal’s duty of restitution is terminated or is diminished *pro tanto*. *Id.* See *Oakley Building & Loan Company v. Murphy*, 84 N.E. 2d 749, 751-752 (Ohio App., 1948), holding that due to change of circumstances resulting from a cashier’s use of a customer’s deposits to conceal her embezzlement of funds from her employer, the employer was not liable to the customer for unjust enrichment.

Section 142 includes the following illustration:

A, without authority, but having power to bind B thereby, borrows \$1000 from C purporting to be acting for B. A retains this for his own purposes. To prevent discovery, he borrows \$1000 from D, purporting to act for B, but this time

without power to bind him. With this he pays C and averts discovery, in the meantime embezzling larger sums from B. B is under no duty of restitution to D.

§142, comment *b*, illustration 10.

Like the rogue employee in illustration 10, King used her position to fraudulently obtain money from a third party. It is undisputed that King stole from Investors by inflating the checks and totals, and then stealing cash from County's cash drawer in the exact amount of Investors' overpayments.¹⁴ It is undisputed that Investors could have discovered King's ongoing scheme by spending a few minutes per day to reconcile its invoice totals with the amount paid, T 434-435, and that the day that Investors notified County of a single day's overcharges, the overcharges stopped, T 68. Each day that Investors failed to check its receipts was one more day that King was able to remove cash. If Investors had spent a few minutes per day to reconcile, the theft would have stopped immediately, T 244, or would never have started in the first place.

¹⁴ Every day County reconciled its books and confirmed that the amounts deposited in the County Treasury matched the amounts that were taken in for the day's transactions, T 179, 183, 195, 310, 322. The audit performed by Recorder confirmed that County's daily deposits never exceeded the charges due for that day's recording of documents and other transactions, T 182-183, 195, 242, and that, except for Investors, the calculated totals for all title companies were accurate, T 205.

In *Western Casualty and Surety Co. v. Kohm*, 638 S.W. 2d 798 (Mo. App. E.D. 1982) and *Blue Cross Health Services, Inc. v. Sauer*, 800 S.W. 2d 72 (Mo. App. E.D. 1990), the Eastern District acknowledged and applied the principles set forth in *Restatement, Restitution*, §142, including the applicable comments. See *Kohm*, 638 S.W. 2d at 800, citing *Restatement, Restitution*, §142(3)(b) and *Blue Cross Health Services*, 800 S.W. 2d at 76, citing *Restatement, Restitution*, §142(g) Comment at 577. However, in the present case, the Eastern District failed to discuss or distinguish *Restatement, Restitution*, §142, comment *b* and failed to explain why King's theft of plaintiff's overpayments did not terminate or diminish County's duty of restitution.

Restatement, Restitution, §142, including the comments and illustrations, aptly states the law, see *Kohm* and *Blue Cross Health Services*, and directly applies to the factual situation in this case. As a result of King's removal of cash, which would have stopped immediately if Investors had examined its receipts, any duty of restitution owed by County should be diminished *pro tanto*. *Restatement, Restitution*, §142; *Oakley*, 84 N.E. 2d at 751-52; and *Fegan v. Great Northern Ry. Co.*, 81 N.W. 39 (N. D. 1899). Therefore, the evidence did not establish that County's "retention" of Investors' overpayments was unjust, and County's motion for a directed verdict and motion for judgment notwithstanding the verdict should have been granted.

IV. The trial court erred in giving Jury Instruction No. 8 (withdrawal instruction), because evidence of Plaintiff's failure to examine the receipts provided each day by County concerned an issue still before the jury, namely whether the payments were made under circumstances in which retention without refund would be unjust, and the withdrawal of this evidence prejudiced Defendants and requires reversal.

The trial court erred in giving Jury Instruction No. 8, LF 346, A4, patterned after MAI 34.02 [1978 Revision], which provides:

The evidence that Plaintiff Investors Title Co., Inc., did or did not take action to verify charges made by the St. Louis County Recorder of Deeds is withdrawn from the case and you are not to consider such evidence in arriving at your verdict with respect to Plaintiff Investors Title Co. Inc's claim against Defendants St. Louis County and Janice Hammonds for money had and received.

Id.

A withdrawal instruction is only to be given when there is evidence that might mislead the jury in its consideration of the case as pleaded and submitted. *Klaus v. Deen*, 883 S.W. 2d 904, 905 (Mo. App. E.D. 1994). The appellate court reviews for abuse of discretion. *Id.* The trial court may not withdraw evidence if it concerns an issue still before the jury. *Klaus* at 907. The Court of Appeals will not reverse a verdict due to

instructional error unless the error is prejudicial, materially affecting the merits of the action. *City of Sullivan*, 142 S.W. 3d at 197.

In finding that Investors' failure to check its receipts did not affect its right to recover, the Eastern District failed to recognize that change of circumstances is an exception to the general rule stated in *Restatement, Restitution*, §59 that the payor's lack of care or negligence does not diminish his right to recover mistaken payments. The comments to *Restatement, Restitution*, §59 and §142¹⁵ make it clear that Investors' failure to examine receipts is important in determining the allotment of the loss caused by King's stealing:

Where an innocent transferee has changed his position so that either he or the payor must suffer loss, the fact that the transferor has been neglectful in creating the situation is important in determining the allotment of the loss.

Restatement, Restitution, § 59, comment *a*, citing comment *c* on §142.

Where events are such that a loss must be suffered by one of the parties, either with or without the ability to obtain reimbursement from a third person, justice does not require that the recipient should bear this loss, where he is guilty of no greater fault than that of the claimant.

Restatement, Restitution, §142, comment *a*.

¹⁵ *Restatement, Restitution*, §142, including the comments, is a correct statement of the law. See *Kohm* 638 S.W. 2d at 800 and *Blue Cross Health Services*, 800 S.W. 2d at 76.

In determining whose fault is greater, the circumstances both preceding and subsequent to the transaction are considered. Thus, if, after the transaction but before the loss, either party becomes aware of facts from which, were he careful, he would ascertain that it was entered into under a basic mistake, such failure constitutes lack of due care and is to be considered in the determination of fault.

Restatement of Restitution, §142, comment *c*.

It is undisputed that Investors could have discovered its overpayments by spending a few minutes per day to examine its receipts, T 434-435, and that each day that Investors failed to check its receipts was one more day that King was enabled to continue her scheme. Thus, Investors' lack of care was relevant to the allotment of loss, *see Restatement, Restitution*, § 59, comment *a*, and should have been considered in the determination of fault, *see Restatement of Restitution*, §142, comment *c*.

The evidence of Plaintiff's failure to examine receipts was relevant to an issue still before the jury, namely whether the payments were made under circumstances in which retention without refund would be unjust. *See Kubley v. Brooks*, 141 SW 3d 21, 32 (Mo. 2004); *Restatement, Restitution*, §142. For this reason, the jury would not have been misled by being permitted to consider this evidence.

If the jury had been allowed to consider Investors' failure to check receipts, the verdict would likely have been different. The withdrawal of this evidence prejudiced

Defendants, materially affected the merits of this action, and requires reversal. *See Klaus*, 883 S.W. 2d 904.

V. The trial court erred in refusing to give proffered Jury Instruction No. C stating Defendants’ “change of circumstances” defense because there was sufficient evidence for the jury to decide that Margaret King stole cash in the exact amount of Plaintiff’s overpayments and that Defendants were no more at fault than Plaintiff in failing to discover that King was inflating Plaintiff’s checks and totals, and Jury Instruction No. C correctly stated the law to be applied.

The trial court erred in refusing to give proffered Jury Instruction No. C stating County’s change of circumstances defense based on *Restatement of Restitution*, §142¹⁶.

Instruction No. C, LF 352, A5, not in MAI, provides:

If you find in favor of plaintiff Investors Title Co., Inc., your verdict must be for defendants St. Louis County and Janice Hammonds if you believe:

First, that circumstances have so changed that it would be unjust to require defendants to make restitution; and

Second, that defendants were no more at fault than was plaintiff.

¹⁶ The full text of §142 is set forth above at p. 37.

If any party has failed to use care to ascertain relevant facts, such party is at fault within the meaning of this instruction.

Id.

Appellate review of a trial court's refusal to submit an instruction is for abuse of discretion. *Ince v. Money's Building and Development, Inc.*, 135 S.W. 3d 475, 480 (Mo. App. E.D. 2004). An instruction must be supported by evidence, which, if true, is probative of the issues from which the jury can decide the case. *Id.* In considering a party's challenge to the trial court's refusal to give a jury instruction, this Court views the evidence and the reasonable inferences therefrom in the light most favorable to the submission of the instruction and disregards any contrary evidence. *Id.* This Court will only reverse the trial court if the refusal to submit the instruction resulted in prejudice.

Id.

As noted above in Point IV, the Eastern District failed to recognize that change of circumstances is an exception to the general rule stated in *Restatement, Restitution*, §59 that the payor's lack of care or negligence does not diminish his right to recover mistaken payments. Where there has been a change of position, the payor's lack of care in creating the situation is important in determining the allotment of loss. *Id.* comment *a.*

The Eastern District's conclusion to the contrary is not supported by any of the cases cited in the opinion, and fails to discuss or distinguish *Restatement, Restitution*, §142¹⁷.

There was sufficient evidence for the jury to find that, as a result of King's theft of cash, circumstances had so changed that it would be inequitable to require County to make restitution. See *Oakley Building & Loan Company v. Murphy*, 84 N.E. 2d 749, 751-752 (Ohio App., 1948). It is undisputed that Investors could have discovered King's ongoing scheme by spending a few minutes per day to check its receipts, T 434-435. If Investors had done so, King's misconduct would have stopped immediately, or would never have started in the first place. In contrast, the evidence shows that, regardless of how much additional money Defendants might have spent on accounting controls, it could not have eliminated the possibility of theft. T. 415. The evidence was sufficient for the jury to find that County was no more at fault than Investors for failing to discover that King was inflating Investors' checks and totals.

Jury Instruction No. C correctly states the law to be applied to County's change of circumstances defense. *Restatement, Restitution*, §142(1) provides: "The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution." Jury Instruction No. C correctly includes this element by requiring the jury to find: "First, that circumstances

¹⁷ *Restatement, Restitution*, §142, including the comments, is a correct statement of the law. See *Kohm* 638 S.W. 2d at 800 and *Blue Cross Health Services*, 800 S.W. 2d at 76.

have so changed that it would be unjust to require defendants to make restitution.”

Restatement, Restitution, §142(2) provides: “Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious¹⁸ and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.”

Jury Instruction No. C correctly includes this element by requiring the jury to find:

“Second, that defendants were no more at fault than was plaintiff.” *Restatement, Restitution*, §142, comment *c* provides: “If either the claimant or the recipient has failed to use care to ascertain relevant facts, such person is at fault within the meaning of [§142].” Jury Instruction C correctly instructs the jury: “If any party has failed to use care to ascertain relevant facts, such party is at fault within the meaning of this instruction.”

Reversal is necessary because of the erroneous refusal of Instruction C, which prejudiced County and materially affected the merits of this action.

¹⁸ There was no evidence that County’s conduct was tortious. Although there was some evidence regarding County’s failure to discover King’s breach of County’s written cash management policy, §142 specifically applies to situations where a party fails to use care to ascertain relevant facts. *See* §142, comment *c*. Moreover, theft by a rogue employee is not imputed to the employer for purposes of applying §142. *See* §142, illustrations 9 and 10.

CONCLUSION

For the reasons stated in Arguments I, II and III, the judgment and amended judgment should be reversed, with instructions to set aside the verdict of the jury and to enter judgment in favor of Defendants. In the alternative, for the reasons set forth in Arguments IV and V, the judgment should be set aside with instructions to grant Defendants a new trial.

**PATRICIA REDINGTON
COUNTY COUNSELOR**

Patricia Redington, #33143
41 South Central Ave.
Clayton, Missouri 63105
(314) 615-7042
Fax (314) 615-3732

Cynthia Hoemann, #28245
41 South Central Ave.
Clayton, Missouri 63105
(314) 615-7042
Fax (314) 615-3732

Attorneys for Janice Hammonds
and St. Louis County, Missouri

CERTIFICATE OF SERVICE

I hereby certify that one copy of this brief and a 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief were mailed, postage prepaid, this 16th day of June, 2006 to:

Nelson L. Mitten
Riezman Berger, P.C.
7700 Bonhomme, 7th Floor
St. Louis, Mo. 63105

Cynthia L. Hoemann

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains 10,919 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 14-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

Cynthia L. Hoemann